

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

BRIAN H. HERSCHFUS, INDIVIDUALLY  
AND AS TRUSTEE OF THE BRIAN H.  
HERSCHFUS AND FERN SHARI  
HERSCHFUS JOINT REVOCABLE TRUST  
u/a/d March 22, 1994, as Amended,

Case No. 2:22-cv-11174  
Hon. Stephen J. Murphy, III

Plaintiffs, on behalf of themselves  
and all others similarly situated,

v.

CITY OF OAK PARK, a municipal corporation;  
ERIK TUNGATE, City Manager; ROBERT BARRETT,  
Technical and Planning Services Director; and  
JOHN OR JANE DOE, code official(s),  
Jointly and Severally,

Defendants.

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GROUP  
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John J. Gillooly (P41948)  
GARAN LUCOW MILLER, P.C.  
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**DEFENDANTS CITY OF OAK PARK, ERIK TUNGATE AND ROBERT  
BARRETT'S ANSWER TO COMPLAINT, NOTICE OF SPECIAL AND/OR  
AFFIRMATIVE DEFENSES, AND RELIANCE UPON JURY DEMAND**

NOW COME Defendants, CITY OF OAK PARK, ERIK TUNGATE, and  
ROBERT BARETT, by and through their attorneys, GARAN LUCOW

MILLER, P.C., and for their Answer to Complaint, states as follows:

### **INTRODUCTION**

1. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

2. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

3. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

4. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

5. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

6. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

### **PARTIES, JURISDICTION AND VENUE**

7. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

8. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

9. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

10. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

11. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

12. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

13. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

14. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

## **THE NATURE OF THE ACTION**

15. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

16. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

17. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

18. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

19. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

20. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

21. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

22. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

23. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

24. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

25. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

26. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

27. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

28. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

29. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

30. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

31. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

32. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

33. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

34. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

35. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

36. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

37. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

38. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

39. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

40. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

41. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

42. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

43. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

44. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

45. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

46. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

47. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

48. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

49. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.



50. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

51. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

52. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

53. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

54. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

55. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

56. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

57. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

58. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

59. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

60. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

61. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

62. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

63. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

64. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

65. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

66. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

67. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

68. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

69. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

70. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

71. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

72. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

73. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

74. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

75. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

#### **FACTS APPLICABLE TO THE NAMED PLAINTIFFS**

76. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

77. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

78. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

79. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

80. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

81. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

82. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

83. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

84. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

85. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

86. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

87. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

88. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

89. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

90. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

91. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

92. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

93. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

94. Admit.

95. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

96. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

97. Admit.

98. Admit.

99. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

100. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

101. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

102. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

### **SPECIFIC ALLEGATIONS**

#### **COUNT I – DECLARATORY RELIEF**

103. Defendants hereby adopt each and every answer as previously given to paragraphs 1-102 above as though stated herein word for word.

104. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

105. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

106. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

107. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

108. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

WHEREFORE, Defendants, CITY OF OAK PARK, ERIK TUNGATE, and ROBERT BARETT, respectfully request the entry of a Judgment of No Cause for Action or, in the alternative, the entry of an Order for Dismissal and denying Plaintiff the relief requested in sub-paragraphs a.-e. in the ad damnum clause of their Complaint.

### **COUNT II – INJUNCTIVE RELIEF**

109. Defendants hereby adopt each and every answer as previously given to paragraphs 1-108 above as though stated herein word for word.

110. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

111. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

112. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.



113. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

114. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

WHEREFORE, Defendants, CITY OF OAK PARK, ERIK TUNGATE, and ROBERT BARETT, respectfully request the entry of a Judgment of No Cause for Action or, in the alternative, the entry of an Order for Dismissal together with an award of interest, costs and attorney's fees so wrongfully incurred.

**COUNT III – VIOLATIONS OF 42 U.S.C. §1983**

115. Defendants hereby adopt each and every answer as previously given to paragraphs 1-114 above as though stated herein word for word.

116. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

117. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

118. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

119. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

120. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

121. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

122. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

123. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

124. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

125. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

126. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

WHEREFORE, Defendants, CITY OF OAK PARK, ERIK TUNGATE, and ROBERT BARETT, respectfully request the entry of a Judgment of No Cause for Action or, in the alternative, the entry of an Order for Dismissal together with an award of interest, costs and attorney's fees so wrongfully incurred.

#### **COUNT IV – VIOLATIONS OF DUE PROCESS**

127. Defendants hereby adopt each and every answer as previously given to paragraphs 1-126 above as though stated herein word for word.

128. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

129. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

130. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

131. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

132. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

133. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

134. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

135. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

136. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

137. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

138. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

139. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

WHEREFORE, Defendants, CITY OF OAK PARK, ERIK TUNGATE, and ROBERT BARETT, respectfully request the entry of a Judgment of No Cause for Action or, in the alternative, the entry of an Order for Dismissal

together with an award of interest, costs and attorney's fees so wrongfully incurred.

**COUNT V – VIOLATION OF DUE PROCESS**

140. Defendants hereby adopt each and every answer as previously given to paragraphs 1-139 above as though stated herein word for word.

141. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

142. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

143. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

144. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

145. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

146. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

147. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

148. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

149. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

150. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

151. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

152. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

WHEREFORE, Defendants, CITY OF OAK PARK, ERIK TUNGATE, and ROBERT BARETT, respectfully request the entry of a Judgment of No Cause for Action or, in the alternative, the entry of an Order for Dismissal together with an award of interest, costs and attorney's fees so wrongfully incurred.

**COUNT VI – UNJUST ENRICHMENT**

153. Defendants hereby adopt each and every answer as previously given to paragraphs 1-152 above as though stated herein word for word.

154. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

155. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

156. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

WHEREFORE, Defendants, CITY OF OAK PARK, ERIK TUNGATE, and ROBERT BARETT, respectfully request the entry of a Judgment of No Cause for Action or, in the alternative, the entry of an Order for Dismissal together with an award of interest, costs and attorney's fees so wrongfully incurred.

**COUNT VII – MUNICIPAL LIABILITY**

157. Defendants hereby adopt each and every answer as previously given to paragraphs 1-156 above as though stated herein word for word.

158. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

159. As to allegations contained herein, including sub-paragraphs a. - f., denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

160. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

161. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

162. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

163. As to allegations contained herein, including sub-paragraphs a. - d., denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

164. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

165. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

WHEREFORE, Defendants, CITY OF OAK PARK, ERIK TUNGATE, and ROBERT BARETT, respectfully request the entry of a Judgment of No Cause for Action or, in the alternative, the entry of an Order for Dismissal



together with an award of interest, costs and attorney's fees so wrongfully incurred.

### **COUNT VIII – CLASS ALLEGATIONS**

166. Defendants hereby adopt each and every answer as previously given to paragraphs 1-165 above as though stated herein word for word.

167. As to allegations contained herein, including sub-paragraphs a. - e., denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

168. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

169. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

170. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

171. As to allegations contained herein, including sub-paragraphs a. - g., denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

172. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

173. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

174. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

175. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

176. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

177. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

178. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

179. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

180. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

181. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

182. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

183. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

184. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

185. Defendants neither admit nor deny the allegations therein contained for the reason that Defendants are without sufficient information or knowledge upon which to form a belief.

186. Denied, for the reason that same is untrue, and for the further reason that no facts exist to support the allegations contained herein.

WHEREFORE, Defendants, CITY OF OAK PARK, ERIK TUNGATE, and ROBERT BARETT, respectfully request the entry of a Judgment of No Cause for Action or, in the alternative, the entry of an Order for Dismissal and denying Plaintiff the relief requested in sub-paragraphs a.-d. in the ad damnum clause of their Complaint.

Respectfully submitted:

GARAN LUCOW MILLER, P.C.

/s/John J. Gillooly  
JOHN J. GILLOOLY (P41948)  
Attorney for Defendants City of Oak  
Park, Erik Tungate and Robert Barrett  
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Detroit, MI 48207  
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Dated: August 15, 2022

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

BRIAN H. HERSCHFUS, INDIVIDUALLY  
AND AS TRUSTEE OF THE BRIAN H.  
HERSCHFUS AND FERN SHARI  
HERSCHFUS JOINT REVOCABLE TRUST  
u/a/d March 22, 1994, as Amended,

Case No. 2:22-cv-11174  
Hon. Stephen J. Murphy, III

Plaintiffs, on behalf of themselves  
and all others similarly situated,

v.

CITY OF OAK PARK, a municipal corporation;  
ERIK TUNGATE, City Manager; ROBERT BARRETT,  
Technical and Planning Services Director; and  
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Jointly and Severally,

Defendants.

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GROUP  
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GARAN LUCOW MILLER, P.C.  
Attorney for Defendants City of Oak  
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**DEFENDANTS CITY OF OAK PARK, ERIK TUNGATE AND ROBERT  
BARRETT'S NOTICE OF SPECIAL AND/OR  
AFFIRMATIVE DEFENSES**

NOW COME Defendants, CITY OF OAK PARK, ERIK TUNGATE, and ROBERT BARETT, by and through their attorneys, GARAN LUCOW MILLER, P.C., and for their Notice of Special and/or Affirmative Defenses and Reservation of Right to File Additional Affirmative Defenses, state as follows:

1. Defendants deny they breached any of their duties and deny they were negligent in any manner, but state they were guided by and strictly observed all of their legal duties and obligations imposed by operation of law and otherwise, and that all of the actions of their agents, servants and/or employees were careful, prudent, proper and lawful.

2. Plaintiffs have failed to state a claim upon which relief may be granted against Defendants and Defendants therefore reserve the right to move for Summary Judgment pursuant to the Federal Rules of Civil Procedure.

3. Defendants will rely upon all defenses available to it under the Governmental Tort Liability Act, MCL 691.1407, *et seq.*

4. Plaintiffs have failed to state a valid claim in this case, as gross negligence is not a valid claim against a governmental agency.

5. Plaintiffs have failed to state a valid claim in this case as the common law exceptions to governmental immunity do not apply to municipal entities.

6. Plaintiffs' property continues to have substantial, practical value.

7. Plaintiffs have failed to establish that Defendants abused their legitimate powers in an action directly aimed at Plaintiffs' property.

8. Plaintiffs have failed to establish that any governmental action permanently deprived them of the possession or use of their property.

9. Plaintiffs were negligent and/or comparatively negligent in the causation of the subject incident.

10. There was negligence in intervening actions of others that was a proximate cause of the injury to Plaintiffs.

11. Plaintiffs have failed to mitigate their own damages.

12. Plaintiffs' claim for non-economic damages is barred by MCL 600.2959 because the Plaintiffs' fault is greater than the aggregate fault of the other person, persons, firm or corporation that contributed to Plaintiffs' injuries whether or not parties to this action.

13. Plaintiffs damages, if any, were temporary in nature.

14. Diminution in market value is not a proper element of damages.

15. Plaintiffs lack standing to sue in this matter and Defendants therefore will file a Motion to Dismiss the case.

16. Plaintiffs have failed to join all indispensable claims and/or parties.

17. Plaintiffs have failed to state or show sufficient cause warranting designation as a class or class action in this case, and therefore Defendants reserve the right to bring a Motion to Dismiss the allegations regarding a class action.

18. Plaintiffs' cause of action is barred under the doctrine of *res judicata* and/or collateral estoppel.

19. That each of the claims advanced in the Complaint of Plaintiffs are barred by fraud.

20. That each of the claims advanced in the Complaint of Plaintiffs are barred by release, discharge, payment and/or laches.

21. Potential class members may not aggregate their claims in order to satisfy the monetary, jurisdictional threshold of this Court.

22. That each of the claims in the Complaint of Plaintiffs are barred by release, payment and/or statute of limitations.

23. Defendants will rely upon all defenses available to them under the principles of estoppel, the Doctrine of Unclean Hands.

24. Defendants will rely upon all defenses available to it under 42 U.S.C. §1983 and §1988.

25. Defendants will rely upon the defense of illegality.

26. Defendants will rely upon all defenses available to them under the doctrine of *res judicata*.

27. Defendants will rely upon all defenses available to them under the Constitution of the United States of America and the State of Michigan.

28. Defendants will rely upon all defenses available to them under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

29. Defendants will rely upon all defenses available to them under the Home Rule City Act, MCL 117.1, et seq.

30. That each of the claims of Plaintiffs are barred by the Doctrine of Unclean Hands.

31. That Defendants will rely upon all defenses available to them under the Code of Ordinances of the City of Oak Park and the International Property Maintenance Code.

32. Defendants deny that this case is ripe for the entry of an Order for Declaratory Relief as a natural controversy does not exist between Plaintiffs and Defendants.



33. Defendants deny that Plaintiffs were denied their rights to due process under law.

34. Plaintiffs have failed to state sufficient evidence to show that a grant of injunctive relief is appropriate.

35. That Defendants have not deprived Plaintiffs of due process of law.

36. That Defendants have not been unjustly enriched as alleged by Plaintiffs.

37. That this case is not ripe for the entry of an Order for Class Certification on the basis that the Plaintiff has failed and will continue to fail to meet their burden of introducing evidence sufficient to show that the joinder of all members is impracticable, that there exists questions of law or fact to all members, that the harm suffered by the Plaintiffs is typical of the harm suffered by other class members and that the representative parties will fairly and adequately assert and protect the interests of the Class.

38. Defendant hereby reserves the right to add any other special or affirmative defenses which may become known or warranted during the course and pendency of this action.

Respectfully submitted:

GARAN LUCOW MILLER, P.C.

/s/John J. Gillooly

JOHN J. GILLOOLY (P41948)

Attorney for Defendants City of Oak  
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Dated: August 15, 2022

5380094

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

BRIAN H. HERSCHFUS, INDIVIDUALLY  
AND AS TRUSTEE OF THE BRIAN H.  
HERSCHFUS AND FERN SHARI  
HERSCHFUS JOINT REVOCABLE TRUST  
u/a/d March 22, 1994, as Amended,

Case No. 2:22-cv-11174  
Hon. Stephen J. Murphy, III

Plaintiffs, on behalf of themselves  
and all others similarly situated,

v.

CITY OF OAK PARK, a municipal corporation;  
ERIK TUNGATE, City Manager; ROBERT BARRETT,  
Technical and Planning Services Director; and  
JOHN OR JANE DOE, code official(s),  
Jointly and Severally,

Defendants.

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GROUP  
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**RELIANCE ON JURY DEMAND**

NOW COMES Defendants, CITY OF OAK PARK, ERIK TUNGATE, and ROBERT BARETT, and hereby state their reliance upon the jury demand filed by Plaintiff in the above cause of action.

Respectfully submitted:

GARAN LUCOW MILLER, P.C.

/s/John J. Gillooly

JOHN J. GILLOOLY (P41948)

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Dated: August 15, 2022

5380094

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2022, my assistant, Dena Marie Shealy, electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

- **Stuart Sandweiss**  
stuart@metrodetroitlitigation.com, lawclerk@sandweisslaw.com,  
stuartsandweiss@ecf.courtdrive.com,  
lawclerk@metrodetroitlitigationgroup.com
- **John J. Gillooly**  
jgillooly@garanlucow.com, dshealy@garanlucow.com

and I hereby certify that on August 15, 2022, my assistant, Dena Marie Shealy, mailed by United States Postal Service the paper to the following non-ECF participants, with full legal postage prepaid thereon and deposited in the United States mail: **N/A**

Respectfully submitted:

GARAN LUCOW MILLER, P.C.

/s/John J. Gillooly  
JOHN J. GILLOOLY (P41948)  
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